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GARY LIM TING HOWE v. LIM PANG CHEONG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[ORIGINATING SUMMONS NO: 24NCVC-1018-04-2012]
28 AUGUST 2015

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BANKRUPTCY: *Capacity of bankrupt – Mental disorder – High Court declared bankrupt to be mentally disordered – Son and wife appointed as committee of bankrupt's person and estate – Application to set aside order of High Court – Bankrupt's son and wife adduced medical reports to support allegation that bankrupt was suffering from dementia – Surveillance reports showed that bankrupt was able to handle daily tasks – Whether bankrupt capable of managing himself and his affairs due to mental disorder – Mental Health Act 2001, ss. 62, 74*

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CIVIL PROCEDURE: *Judgments and order – Setting aside – Application for – High Court declared bankrupt to be mentally disordered – Son and wife appointed as committee of bankrupt's person and estate – Application to set aside order of High Court – Bankrupt's son and wife adduced medical reports to support allegation that bankrupt was suffering from dementia – Surveillance reports showed that bankrupt was able to handle daily tasks – Whether bankrupt capable of managing himself and his affairs due to mental disorder – Whether court had jurisdiction to make consequential orders or to set aside any proper order – Mental Health Act 2001, ss. 62, 74*

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The second to fourth defendants, the judgment creditors ('JC'), had commenced proceedings at the High Court, pursuant to which the first defendant was adjudged a bankrupt. The plaintiff filed an originating summons seeking an order, *inter alia*, declaring the first defendant to be mentally disordered and for the charge of his affairs to be placed with a committee. After interviewing the first defendant, the High Court allowed the plaintiff's application and declared the first defendant to be mentally disordered within the meaning of Mental Health Act 2001 ('the Act'); and the plaintiff and the first defendant's wife ('Loh') were appointed as the committee of the first defendant's person and estate ('the orders'). In the present application, the JC sought to set aside the orders. The issue that arose for the court's determination was whether the first defendant was incapable of managing himself and his affairs, due to mental disorder. Five medical reports adduced by the plaintiff were in agreement that the first defendant suffered from dementia. According to Loh, the first defendant's condition had deteriorated to such extent that he had to give up golf over the last few years. The JC did not tender any medical report that made a contrary finding. However, the JC produced surveillance reports of a private investigator, showing the first defendant driving two different models of car by himself on several occasions, having breakfast at coffee shops in the heart of Kuala

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Lumpur, shopping at a meat market and playing golf. The plaintiff raised a preliminary objection and argued that s. 62 of the Act does not provide for any power of the court to make any consequential orders or to set aside any proper order.

Held (allowing application with costs; setting aside orders of High Court):

(1) Section 62 of the Act does not reveal the strictures that the plaintiff places on it as the language is adequately wide to cover an application in the nature of the present case. Based on ss. 62 and 74 of the Act, the JC is entitled to apply to court to challenge the status of the mental state of the first defendant. An application by the JC to set aside the orders was no less concerning a matter connected to an inquiry by the fact that it had been after such orders had been given and perfected. The present application sought to set aside the previous orders made as a consequence of an inquiry undertaken pursuant to s. 52 of the Act and the application was connected with the inquiry held. (paras 18 & 20)

(2) The existence of unchallenged medical opinions did not mean that the court was bound to accept the expert medical evidence. The unchallenged evidence that the first defendant was able to carry on daily tasks referred to in the surveillance reports indicated that the first defendant was more than capable of managing himself and his affairs. The first defendant was able to go about these day to day activities unaccompanied and as it appeared, was unimpaired. (paras 34 & 49)

(3) Based on the surveillance reports, it would appear that the first defendant's executive functioning was intact. The first defendant was observed to have played golf on more than one occasion. His ability to manage time and space would also appear to be sufficiently unimpaired as to permit him to not only drive two different models of cars but also to drive into the heart of Kuala Lumpur at rush hour on a weekday, find parking and then have breakfast. To do so was not an insignificant undertaking even for those with full possession of mental faculties. The first defendant's memory of details was also sufficiently adequate to allow him to retrieve his car after having breakfast. If the first defendant was indeed incapable of managing himself, it was difficult to imagine the first defendant's family members would allow him access to car keys, let alone drive himself unaccompanied to the city. (para 50)

Case(s) referred to:

Lim Pang Cheong @ George Lim v. Tan Sri Dato' (Dr) Rozali Ismail & Ors [2008] 1 LNS 909 HC ***(refd)***

Lim Pang Cheong lwn. Tan Sri Dato' Dr Rozali Ismail & Yang Lain [2011] 7 CLJ 645 HC ***(refd)***

Majuikan Sdn Bhd v. Barclays Bank Plc [2014] 9 CLJ 337 CA ***(refd)***

PP v. Muhamad Suhaimi Abdul Aziz [2004] 1 CLJ 378 CA ***(refd)***

Sek Kim Wah v. PP [1988] 1 CLJ 739; [1988] 2 CLJ (Rep) 679 CA ***(refd)***

A *Tan Sri Dato (Dr) Rozali Ismail & Ors v. Gary Lim Ting Howe & Ors [2014] 6 CLJ 55 CA* ***(refd)***
Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Chua Lay Kim & Ors [2015] 4 CLJ 807 HC ***(refd)***
Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Chua Lay Kim (F) & Ors [2013] 1 LNS 231 HC ***(refd)***
B *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC* ***(refd)***
Wong Kim v. Loh Kim Foh [2003] 8 CLJ 813 HC ***(refd)***

Legislation referred to:
Mental Health Act 2001, ss. 2(1), 52, 54(1)(a), 56, 62, 74
C Rules of Court 2012, O. 2 rr. 1, 3, O. 32 r. 13(2)(a)

For the plaintiff/1st defendant - Harvinderjit Singh (Richard WG Lee with him); M/s Richard Lee
For the 2nd to 4th defendants - Gopal Sri Ram (Teh Boon Eng, CK Lim, David Yii & Fadzilah Mohd Pilus with him); M/s Teh & Assocs

D *Reported by Najib Tamby*

JUDGMENT

Azizul Azmi Adnan JC:

E **Introduction**

[1] This is an application by the second to fourth defendants, Tan Sri Dato' (Dr) Rozali Ismail, his brother Mat Hairi Ismail and WWE Holdings Bhd (a company controlled by the brothers), to set aside previous orders of the High Court dated 25 and 27 April 2012 by which:

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(a) the first defendant, Lim Pang Cheong @ George Lim, was found to be mentally disordered within the meaning of the Mental Health Act 2001; and

(b) the plaintiff, Gary Lim (who is the son of George Lim) and Loh Foh
G Fin, the wife of George Lim, were appointed as the committee of George Lim's person and estate.

[2] For ease of reference, the second to fourth defendants are referred to as the judgment creditors (for reasons that will shortly be apparent), while George Lim is referred to as the first defendant. The plaintiff and the
H committee (acting for the first defendant and his estate) were represented by the same counsel, whom I will refer to simply as the counsel for the plaintiff. References to the plaintiff should be taken to include a reference to the committee of the first defendant and of his estate, unless the context requires otherwise.

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[3] In order to understand the context within which the issues of this case lie, it will be necessary to recite a brief background of this case and its other related disputes.

Background Facts

[4] The first defendant had commenced a suit for fees that he alleged were due to him in connection with the procurement of an award to the fourth defendant of a project known as the Jelutong Sewage Treatment Plant and Central Sludge Facility.

[5] The first defendant obtained judgment at the High Court against the judgment creditors[1] and a sum of approximately RM35 million was paid to the first defendant's solicitors in satisfaction of the judgment. The solicitors released the money to the first defendant's instructions, which the judgment creditors claimed was in contravention of an *ex parte* preservation order of the Federal Court. The judgment creditors then sought leave for an order of committal against the first defendant and his solicitors at that time. The motion for committal was ultimately dismissed by the Federal Court, based on its finding of fact that the sum was released prior to the service of the notice of the *ex parte* preservation order[2].

[6] The judgment creditors had in the meantime appealed against the whole of the decision of the High Court. The Court of Appeal allowed the appeal and directed restitution to the judgment creditors.

[7] The first defendant failed to refund the sum paid.

[8] The judgment creditors commenced bankruptcy proceedings at the High Court of Malaya at Shah Alam, pursuant to which the first defendant was adjudged a bankrupt. Following a creditors' meeting, a public examination of the first defendant was first fixed for 6 April 2012 and subsequently adjourned to 26 April 2012, which the first defendant attended and where he was questioned by an officer from the office of the Director General of Insolvency (the DGI).

[9] On the previous day, 25 April 2015, the plaintiff had filed an originating summons seeking an order, *inter alia*, declaring the first defendant to be mentally disordered and for the charge of his affairs to be placed with a committee. As mentioned in para. 1 *ante*, the orders of 25 and 27 April 2012 were granted as a consequence, by my brother judge O'Hara J. In granting the order of 27 April 2012, O'Hara J had interviewed the first defendant, in exercise of the powers of court under s. 54(1)(a) of the Mental Health Act 2001.

[10] At the next public examination of the first defendant on 14 May 2012, the High Court at Shah Alam was informed of the proceedings under the Mental Health Act 2001, and of the orders granted by O'Hara J. An application was then made by the committee of the first defendant and his estate to dispense with the public examination.

[11] On 27 June 2012, the DGI filed the application in encl. 11 to set aside the 27 April 2012 order. On 6 July 2012, the judgment creditors filed this application in encl. 14 to intervene in these proceedings and to set aside the orders of 25 and 27 April 2012. These applications were dismissed by O'Hara J on 14 December 2012.

[12] The DGI and the judgment creditors appealed against this decision. While the DGI subsequently withdrew its appeal, the judgment creditors were allowed by the Court of Appeal to intervene and to be added as defendants in the proceedings[3]. However, no order was granted to set aside the orders of 25 and 27 April 2012, and hence the judgment creditors sought and obtained leave to appeal to the Federal Court.

[13] On 26 November 2014, the Federal Court allowed the appeal of the judgment creditors and ordered for the application in encl. 14 to be re-heard before another judge. This court heard submissions from counsel on 22 July 2015.

[14] I mention for completeness that the facts giving rise to the dispute between the parties have begotten three further reported cases[4], all of which need not concern us for the purposes of the present application.

Jurisdiction

[15] Counsel for the plaintiff raised the preliminary point regarding the jurisdiction of this court to set aside an order made pursuant to the Mental Health Act 2001. Counsel argued that s. 62 of the Mental Health Act 2001 does not provide for any power of the court to make any consequential orders or to set aside any proper order. Section 62, argued counsel, refers to orders made on the application for an inquiry under s. 52, which inquiry had already been conducted and determined by O'Hara J on 27 April 2012.

[16] It was further advanced on behalf of the plaintiff that, because the current proceedings are governed under the Mental Health Act 2001, this court has no jurisdiction to grant orders that are outside the scope of the Mental Health Act 2001. Various authorities were cited with erudition (and commendable brevity) by counsel for the plaintiff in support of this proposition, into which it will not be necessary to delve for the present purposes.

[17] The specific language used in s. 62 is as follows:

> Subject to this Act, the Court may, on an application made to it concerning any matter connected with an inquiry, make such order in respect of the application and the costs of the application and of the consequent proceedings as under the circumstances seem just but no order for costs shall be made under this section against any public officer.

[18] In my judgment, a plain reading of s. 62 does not reveal the strictures that counsel for the plaintiff places on it, as the language is adequately wide to cover an application in the nature of the present case. An application by the judgment creditors to set aside the orders of 25 and 27 April 2012 is no less concerning a matter connected with an inquiry by the fact that it has been made after such orders had been given and perfected. The present application seeks to set aside the previous orders made as a consequence of an inquiry undertaken pursuant to s. 52, and it is for this reason that the application is connected with the inquiry held by O'Hara J on 27 April 2012.

[19] I am fortified in my views by the decisions of the Court of Appeal and of the Federal Court in this present case.

[20] The following passage of the judgment of the Court of Appeal[5] makes it clear that the Court of Appeal considered that ss. 62 and 74 entitle the judgment creditors to apply to court to challenge the status of the mental state of the first defendant:

> From the above provisions (where the court referred to ss. 55, 62 and 74), it is quite clear that anyone with any information may seek remedy in court to challenge the status of mental state of the third respondent. With such clear provisions in a specific statute, the court is empowered to disregard the impediments alluded by learned counsel for the respondents. It must not be forgotten that the mental status of any person is a fluid matter and changes to it can and do occur as acknowledged by the Mental Health Act itself when it contains provisions set out earlier.

[21] Following the decision of the Court of Appeal, the Federal Court heard cross-appeals on, *inter alia*, the following questions of law:

> Whether the Court of Appeal in an appeal against the dismissal of an application to intervene made under section 62 if the Mental Health Act 2001 (the Act) and to set aside an order that a person is mentally disordered (as defined in section 51 of the Act) should when granting intervention also discharge the *ex parte* order obtained under section 56 of the Act and direct a re-hearing before the High Court.[6]
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> Can perfected orders made under the Mental Health Act 2001 (Act 615) which *inter alia* declare/find a person to be mentally disordered and incapable of managing himself and his affairs and appointing a committee of that person and the estate of that person, be set aside, without a fresh inquiry under section 74 of the Mental health Act 2001 (Act 615) being first undertaken?[7]

[22] On 26 November 2014, the Federal Court dismissed the appeal by the plaintiff, allowed the appeal of the judgment creditors and ordered the re-hearing of encl. 14, which is how this matter came to be heard before me.

[23] It follows by necessary implication from the orders of the Federal Court that it is of the view that this court is clothed with the necessary jurisdiction to undertake a re-hearing of the application in encl. 14. Given

that the issue of whether perfected orders made under the Mental Health Act 2001 may be set aside has been finally determined by the Federal Court, I am of the view that the plaintiff is precluded from re-raising the same issue before this court at the re-hearing, on the basis that the issue is *res judicata*.

Admissibility Of Enclosures 42, 43 And 48

[24] Counsel for the plaintiff also argued that the affidavits in encls. 42, 43 and 48 ought to be expunged from the court records on account of the "spectacular" delay of the judgment creditors in filing them, months after the Federal Court order of 26 November 2014, and in contravention of O. 32 r. 13(2)(a) of the Rules of Court 2012.

[25] The Rules of Court 2012 are of course a procedural code, which is subject to the express objective of enabling the court to deal with cases justly (O. 2 r. 1). Non-compliance with any requirement of the Rules of Court 2012 is to be treated as an irregularity, and this court would therefore be entitled to exercise its discretion to cure the irregularity and to have regard to the contents of encls. 42, 43 and 48 for the purposes of the re-hearing. In any event, counsel for the plaintiff has not sought to the argue that the delay on the part of the judgment creditors has occasioned such substantial miscarriage of justice or occasioned such prejudice as would entitle me to allow the preliminary objection under O. 2 r. 3.

[26] I accordingly exercise the curative powers of court in this regard.

The Substantive Issues

[27] This brings us to the substantive issue before me, which is whether the first defendant is "incapable of managing himself and his affairs", due to his mental disorder.

The Law

[28] There is no dispute between the parties as to the position in law with respect to a determination under s. 56 of the Mental Health Act 2001. This section provides for the power of the court to determine whether a person who is alleged to be mentally disordered is incapable of managing himself and his affairs because of this mental disorder.

[29] Such a determination may be made only after an inquiry has been held to determine whether such person is incapable of managing himself and his affairs by reason of mental disorder. For the purposes of the inquiry, the court may order the subject to be personally examined by the court, by a psychiatrist or any other appropriate person (s. 54). The court may also, in addition to or *in lieu* of exercising its powers under s. 54, order the subject to be admitted into a psychiatric hospital for observation.

[30] Section 2(1) of the Mental Health Act defines "mental disorder" as: A

> any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired ...

[31] In *Wong Kim v. Loh Kim Foh*[8], Abdull Hamid Embong J considered the definition of "mental disorder" contained in the then Mental Disorders Ordinance 1952. The definition of "mental disorder" in s. 2(1) of the Mental Health Act 2001 is in *pari materia* with that contained in its predecessor legislation. His Lordship had this to say: B

> It must be quickly qualified that the terms used in the abovementioned definition are legal and not medical categories. The determination of whether a person is mentally disordered is thus a judicial decision and one that could be arrived at by the court with or without the assistance of any medical opinions, although decided cases from other Commonwealth jurisdictions are of the view that the courts are better-placed in acting with the advice of medical opinions. The existence of expert medical evidence however does not relieve the court from the obligation of forming its own judgment (see *Richmond v. Richmond* (1914) 111 LT 273). C D
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> An application such as this however, ought to be supported by 'some medical evidence in the nature of a medical certificate of some doctor who has had a reasonable opportunity of seeing the condition of the alleged invalid' (see *Muhammad Yaqub v. Nazir Ahmad & Ors Allahabad* 1920 Vol XLii 504. E
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> The commentary by BR Boetra in his book on the *Indian Mental Health Act 1987* (2nd Ed) on the responsibility of the court when faced with an application such as this is noteworthy, and is now quoted: F
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> > A person does not become a 'lunatic' under the Lunacy Act on the debatable niceties of psychological and psychiatric theories. It is, therefore, essential that the Judge must apply his mind and wherever possible examine personally the lunatic unless he has good reason not to do so, in very exceptional case. It cannot be too much emphasised that it is not the ultimate responsibility of the mental specialists and specialist doctors whose views are always entitled to great deference, but it is the responsibility of the Court of Law to find and hold that a person is a 'lunatic' under the Lunacy Act and that he should be detained in a mental hospital. This responsibility on the court is serious and heavy and must be discharged with great care and circumspection, and the court cannot do it vicariously through the medical and psychological specialists, though it can always and should preferably be guided by them. G H
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> The above passage is now applied as a principle to guide this court in determining the matter at hand. I

> The opinions of experts are of course relevant facts under s. 45(1) of the Evidence Act 1950 and may be admissible to furnish the court with, as in this case, scientific information which is likely to be outside the experience and knowledge of a judge. If however a judge on the proven facts can form his own conclusions without help, the opinion of an expert is unnecessary (see *Chou Kooi Pang & Anor v. Public Prosecutor* [1998] 3 SLR 593; *R v. Turner* [1975] QB 834). In *Ong Chan Tow v. Regina* [1963] MLJ 1960, it was held that expert opinion evidence of a psychiatrist to show how an ordinary person who was not suffering from mental illness was likely to react to the stresses and strains of life is not admissible as they are within ordinary human experience.

[32] In my judgment, the principle set out in the passage above should continue to apply under the Mental Health Act 2001. Accordingly, it is for the court to determine whether the first defendant is incapable of managing himself and his affairs by reason of his mental disorder.

[33] In the present case, five medical reports have been proffered in evidence by the plaintiff (summaries of which are set out in para. 41, post). All the reports are in agreement that the first defendant suffers from dementia. The judgment creditors have not tendered any report that makes a contrary finding. The present case is therefore not one where the court has to determine an issue in the face of conflicting expert evidence.

[34] Nonetheless, the existence of unchallenged medical opinions does not mean that this court is bound to accept the expert evidence of the medical practitioners. A court may still make a finding that is contrary to unchallenged medical opinions, if there are other facts that would entitle it to do so. Wee Chong Jin CJ in the Singapore Court of Appeal case of *Sek Kim Wah v. PP*[9], referred to the decision of *R v. Byrne*[10] and stated as follows:

> Thus, the verdict as to abnormality of mind is plainly a finding of fact which must be founded on all the evidence which evidence of course includes medical opinion. Even where such medical opinion is unchallenged, the trial Judges would be perfectly entitled to reject or differ from the opinions of the medical men, if there are other facts on which they could do so.

[35] This principle in *Sek Kim Wah* was cited with approval by the Malaysian Court of Appeal in *PP v. Muhamad Suhaimi Abdul Aziz*[11].

[36] While a court may depart from the unchallenged evidence of experts, such a departure must be based on sound grounds: see *Dr Lo Sook Ling Adela v. Au Mei Yin Christina & Anor*[12] where the Singapore Court of Appeal in discussing the evidence of a professor of botany on the age of a belimbing tree in a dispute involving a claim of adverse possession stated:

> It was true that the age of the Belimbing tree, being 20 years old, was only an estimate. Because it was an estimate, the trial judge could not accept the evidence of Prof Rao. **In law, while a judge is not obliged to accept**

> **the opinion of an expert, even in a situation where there is no contrary expert evidence, such rejection must be based on sound grounds**: see *Saeng-Un Udom v. PP* [2001] 3 SLR 1 at 8-9. We did not think just because the age given was an estimate, that in itself was a good ground to reject the expert opinion. In the realm of expert evidence, it invariably involves a matter of judgment. This was a scientific issue outside the learning of a judge. (emphasis added)

[37] Counsel for the judgment creditors highlighted the following passage from the case of *Sakthivel Punithavathi v. PP*[13], which is instructive in the context of the present case:

> 76 What is axiomatic is that a judge is not entitled to substitute his own views for those of an uncontradicted expert's: *Saeng-Un Udom v. PP* [2001] 3 SLR 1. Be that as it may, a court must not on the other hand unquestioningly accept unchallenged evidence. Evidence must invariably be sifted, weighed and evaluated in the context of the factual matrix and in particular, the objective facts. An expert's opinion "should not fly in the face of proven extrinsic facts relevant to the matter" per Yong Pung How CJ in *Dr Khoo James v. Gunapathy d/o Muniandy* [2002] 2 SLR 414 at [65]. In reality, substantially the same rules apply to the evaluation of expert testimony as they would to other categories of witness testimony. Content credibility, evidence of partiality, coherence and a need to analyse the evidence in the context of established facts remain vital considerations; demeanour, however, more often than not recedes into the background as a yardstick.

[38] The Court of Appeal in Malaysia in the case of *Majuikan Sdn Bhd v. Barclays Bank Plc*[14] cited with approval the passage from *Dr Lo Sook Ling Adela v. Au Mei Yin Christina* above, and formulated the applicable principles in the following manner:

> We are in agreement with these principles and in our view, a judge who is not an expert himself, should defer to expert opinion unless that evidence is obviously indefensible and is not supported by the basic facts of the case. Where there are conflicting expert opinions, the judge is of course entitled to bring to bear his own judicial appreciation of the matter, and choose one over the other, but where there is only one expert opinion, he should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case.

[39] The evidence in this case, which will be considered in the following paragraphs, will be evaluated in the light of the foregoing principles.

The Medical Reports

[40] The evidence from the medical reports tendered in support for the case of the plaintiff show that the first defendant suffers from Alzheimer's disease and dementia. The medical observations from the magnetic resonance imaging scans undergone by the first defendant establish that his brain has

suffered some degree of degeneration, that there were lesions of dead tissue in certain portions of his brain, and that there were constrictions in the small blood vessels in certain portions of his brain[15].

[41] Brief summaries of the five medical reports tendered by the plaintiff are set out below:

(a) Dr Azmi Abdul Rashid, a consultant neurologist/physician at the Damansara Specialist Hospital provided a letter dated 16 February 2012[16], which diagnosed the first defendant as suffering from dementia based on a neurological evaluation held on 12 July 2011. This letter did not provide any opinion whether the first defendant was capable of managing himself or his affairs.

(b) Dr Tamil Selvan Muthusamy, a consultant interventional cardiologist at the Damansara Specialist Hospital in a medical summary dated 18 April 2012[12] provided a diagnosis of dementia "for which he was referred to a neurologist who agreed with the diagnosis". It would appear that the neurologist here refers to Dr Azmi, above.

(c) Tan Sri Dato' Seri Dr M Mahadevan, a consultant psychiatrist and former chief psychiatrist of the government, formed the view that the first defendant was "incapable of managing his private, personal and business affairs". This opinion was set out in an undated letter that appeared to have been received by the solicitors of the plaintiff on 23 April 2012[18].

(d) Dr Stephen Jambunathan, a consultant psychiatrist and psychotherapist at the University Malaya Medical Centre in his medical report of 16 May 2012[19] provided a diagnosis that the first defendant suffered from dementia and depression. Dr Jambunathan noted that although the first defendant's "remote memory and awareness of the extent of his estate is intact, he has expressed the need for his wife and children to legally take over his responsibilities in managing his estate".

(e) Dr Subash Kumar Pillai, a consultant psychiatrist in the University Malaya Specialist Centre, in an undated medical report prepared some time in 2015[20] opined that:

> (the first defendant) has history to suggest that he had Dementia of mixed origin Alzheimer and Vascular type. This is evident by the MRI scan that showed cerebral atrophy and microvascular ischemia with infarcts in the right globus pallidus and right posterior parietal lobe. These cognitive deficits have significantly impaired his social and occupational functioning. There is also a (sic) impairment in his executive functioning.

Dr Pillai further stated that:

> (the first defendant) would need supervision to manage some of the more complex daily activities like banking, shopping and paying bills or similar activities which require the use of executive functioning (planning, organising, strategising, attention, remembering details, managing time and space)

Dr Pillai's diagnosis in his medical report took into consideration the account provided by the first defendant's wife. Among others, she told Dr Pillai that the first defendant had stopped playing golf for the last few years, the significance of which will be clear shortly.

[42] The following observations may be made in connection with the five medical reports:

(a) all the reports diagnose the first defendant as suffering from dementia. Of course, it is not sufficient under s. 56 of the Mental Health Act 2001 for the subject to merely be mentally disordered; such mental disorder must render him incapable of managing himself or his affairs before a court may grant the appropriate order;

(b) none of the reports are inconsistent with any other report; and

(c) only two of the reports those of Dr Mahadevan and Dr Pillai express opinions on the inability of the first defendant to manage himself and his affairs.

The Evidence Of The Judgment Creditors

[43] It was advanced for the judgment creditors that the first defendant had been actively participating in litigation by giving evidence, affirming affidavits and instructing solicitors. The instances cited on behalf of the judgment creditors occurred in 2010 and 2011.

[44] However, Alzheimer's disease and dementia are of course degenerative conditions. Accordingly, the evidentiary value of these incidents cited by counsel for the judgment creditors would necessarily be limited, as the possibility of further degeneration in the condition of the first defendant between 2011 and the time the inquiry was held by O'Hara J on 27 April 2012 cannot be precluded.

[45] The judgment creditors also referred to the notes of proceedings in the public examination of the first defendant in the Shah Alam High Court held on 26 April 2012, which was a day before the inquiry held by O'Hara J. The counsel for the plaintiff pointed out that these notes of proceedings have not been certified as official transcripts. In any event, having reviewed the transcripts, I am of the view that nothing conclusive can be gleaned from the responses from the first defendant to show that he was not incapable of managing himself or his affairs.

[46] The judgment creditors produced surveillance reports of a private investigator relating to incidents observed in May and June 2012, November 2012 and June 2015. These reports show, among others, the first defendant driving on several occasions two different models of cars by himself, having breakfast at coffee shops in central Kuala Lumpur, shopping at a meat market as well as not only playing golf, but playing sufficiently well to be placed eighth in what appeared to be an amateur golf tournament. The counsel for the plaintiff submitted that these activities were not complex activities and that the carrying on of these activities was not inconsistent with the mental ailments from which the first defendant was suffering.

[47] At the hearing on 22 July 2015, I made the observation that the photographs in the surveillance reports exhibited in the relevant affidavits were not clear, in response to which counsel for the judgment creditors gave an undertaking to provide colour copies of the reports to the court, which they duly did the following day. However, the reports that were delivered to court contained additional material which was not referred to or exhibited in the affidavits in encls. 13 and 48. Counsel for the plaintiff immediately placed their strong objections on the basis that the complete surveillance reports relating to exhs. AL17 and AL18 had not been made available to them and requested that the court disregards the new documents that had been delivered to the court on 23 July 2015.

[48] I have acceded to the request from counsel for the plaintiff, and have not taken into account any part of the reports that that were delivered to the court on 23 July 2015 that were not also contained in any previous affidavit filed before the court.

Decision

[49] The unchallenged evidence that the first defendant was able to carry on the daily tasks referred to in the surveillance reports indicate that the first defendant is more than capable of managing himself and his affairs. The first defendant was able to go about these day to day activities unaccompanied and, it appears, unimpaired. These activities would have included interacting with the providers of goods and services and paying for such goods and services.

[50] Dr Pillai's report suggests that shopping and paying bills would be activities that require the use of "executive functioning". Based on the evidence of the surveillance reports, it would appear that the first defendant's executive functioning is intact, as he was able to shop for groceries, pump and pay for fuel for his car and make payment for breakfast. His ability to manage time and space would also appear to be sufficiently unimpaired as to permit him to not only drive two different models of cars, but also to drive into the heart of Kuala Lumpur at rush hour on a weekday, find parking, and then have breakfast at a coffee shop on Jalan Imbi. Those familiar with the

condition of traffic in Kuala Lumpur at rush hour will know that to do so is not an insignificant undertaking even for those with full possession of mental faculties. His memory of details was also sufficiently adequate to allow him to retrieve his car after having breakfast.

[51] It will be evident that the opinion expressed in the report of Dr Subash Kumar Pillai was premised partly on the account given by the first defendant's wife, who had stated that the first defendant's condition had deteriorated to such an extent that he has had to give up golf "over the last few years". This is patently incorrect, as the first defendant was observed to have played golf on more than one occasion through the surveillance reports. Accordingly, the opinion expressed by Dr Pillai that the first defendant "would need supervision to manage some of the more complex daily activities such banking, paying bills or similar activities which require the use of executive functioning (planning, organising, strategising, attention, remembering details, managing time and space)" was based on a misapprehension of the true facts, since there is clear evidence of the first defendant's ability to carry out activities that do require some form of "executive functioning".

[52] At para. 32 of the judgment of O'Hara J dated 1 March 2013, he attached little weight to the evidence from the report of the private investigator, after having noted that the rules of evidence do not apply in respect of affidavit evidence. I have had the advantage of considering the additional surveillance reports relating to the periods in November 2013 and June 2015, which were not available to O'Hara J at the time he conducted the first hearing for the application in encl. 14. These additional reports corroborate and amplify the observations made in the surveillance reports for the period in May and June 2012[21].

[53] It was advanced on behalf of the plaintiff that the surveillance reports merely covered narrow slices in time, and therefore the observations of the first defendant carrying on complex activities requiring a high level of functioning were unrepresentative of the general condition of the first defendant, as he could have been experiencing moments of lucidity at the time the observations were made. While I leave open the possibility that a subject suffering from dementia and Alzheimer's disease may experience brief flashes of lucidity within the cloud that shrouds the mind, it is difficult to imagine that the first defendant's family members would allow him access to car keys, let alone allow him to drive himself unaccompanied into the city, if he was indeed incapable of managing himself. It is reasonable to expect that, if the first defendant's condition were such that he slipped in and out of lucidity, his family would have put in place steps to prevent the first defendant from putting himself in a position where he could endanger himself and others in the event that he was to slip out of lucidity at an inopportune time.

[54] Having carefully evaluated the evidence in this case as a whole, and in particular the objective facts established by the surveillance reports, I find that the reports provide sound grounds for departing from the opinions of Dr Mahadevan and Dr Pillai (both of which suggest that the first defendant is incapable of managing himself and his affairs) in accordance with the principles discussed at paras. 34 to 38, ante. The expert opinions, in the light of the evidence contained in the surveillance reports, are obviously indefensible. I am therefore not persuaded that the first defendant is incapable of managing himself and his affairs, and I accordingly order that:

(a) the orders of this court dated 25 April 2012 and 27 April 2012 be set aside with immediate effect; and

(b) costs of RM10,000 be paid to the judgment creditors by the plaintiff and the first defendant.

Endnotes:

1. *Lim Pang Cheong lwn. Tan Sri Dato' Dr Rozali Ismail & Yang Lain* [2011] 7 CLJ 645, [2010] MLJU 1760
2. *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 3 MLJ 458, [2012] 2 CLJ 849
3. The decision of the Court of Appeal is reported at *Tan Sri Dato (Dr) Rozali Ismail & Ors v. Gary Lim Ting Howe & Ors* [2014] 6 CLJ 55 CA
4. *Lim Pang Cheong @ George Lim v Tan Sri Dato' (Dr) Rozali Ismail & Ors* [2008] 1 LNS 909, *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Chua Lay Kim (F) & Ors* [2013] 1 LNS 231 and *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Chua Lay Kim & Ors* [2015] 4 CLJ 807
5. [2014] 6 CLJ 55 at para. 21
6. The question posed by the judgment creditors, reproduced at exh. GLTH-24 of encl. 46
7. The question posed by the plaintiff and the committee, reproduced at exh. GLTH25 of encl. 46
8. [2003] 8 CLJ 813; [2003] 4 MLJ 535
9. [1988] 1 CLJ 739; [1988] 2 CLJ (Rep) 679; [1988] 1 MLJ 348
10. [1960] 44 Criminal Appeal Rep 246
11. [2004] 1 CLJ 378
12. [2002] 1 SLR 408
13. [2007] 2 SLR 983
14. [2014] 9 CLJ 337; [2015] 1 MLJ 171
15. See pp. 93 and 94 of encl. 46
16. See p. 208 of encl. 15

17. See p. 206 of encl. 15
18. See exh. GLTH-2 in encl. 2
19. See p. 88 of encl. 15
20. See pp. 93 et seq of encl. 46
21. Enclosure 13, exh. AL17